IN THE

Supreme Court of the United States

October Term, 1956.

No. ~~[illegible]~~ 107

ELIZABETH DONNER HANSON, Individually, as Executrix of the Will of Dora Browning Donner, Deceased, and as Guardian ad Litem for JOSEPH DONNER WINSOR and DONNER HANSON, and WILLIAM DONNER ROOSEVELT, Individually, *Appellants,*

v.

KATHERINE N. R. DENCKLA, Individually, and ELWYN L. MIDDLETOWN, as Guardian of the property of DOROTHY BROWNING STEWART, Also Known as DOROTHY B. STEWART and DOROTHY B. RODGERS STEWART, an Incompetent Person, *Appellees.*

JURISDICTIONAL STATEMENT.

WILLIAM H. FOULK,
229 Delaware Trust Bldg.,
Wilmington 1, Delaware,
MANLEY P. CALDWELL,
CALDWELL, PACETTI, ROBINSON & FOSTER,
501 Harvey Building,
West Palm Beach, Florida,
Attorneys for Elizabeth Donner Hanson, Individually, as Executrix of the Will of Dora Browning Donner, Deceased, and as Guardian ad Litem for Joseph Donner Winsor and Donner Hanson, and William Donner Roosevelt, Appellants.

Of Counsel:
EDWARD MCCARTHY,
MCCARTHY, LANE & ADAMS,
423 Atlantic Bank Bldg.,
Jacksonville, Florida,
Attorney for Elizabeth Donner Hanson as Guardian ad Litem for Joseph Donner Winsor and Donner Hanson.

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Appellants,

v.

KATHERINE N. R. DENCKLA, Individually, and ELWYN L. MIDDLETON, as Guardian of the property of DOROTHY BROWNING STEWART, also known as DOROTHY B. STEWART and DOROTHY B. RODGERS STEWART, an incompetent person,

Appellees.

JURISDICTIONAL STATEMENT.

Appellants appeal from the judgment of the Supreme Court of Florida entered on September 19, 1956, with petition for rehearing denied on November 28, 1956, affirming in part and reversing in part a summary final decree of the Circuit Court of Palm Beach County, Florida, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINIONS BELOW.

(a) The opinion of the Supreme Court of Florida (4a) filed in this action is not yet reported. The opinion of the Circuit Court of Palm Beach County (1a) is unreported.

Emphasis used throughout is supplied unless otherwise noted. References to: T.— are to the certified transcript of the proceedings in State Court; —a to the Appendix hereto.

JURISDICTION.

(b) The jurisdiction of the Court is invoked on the following grounds:

Nature of the Proceedings.

(i) This action was brought to determine the validity of the exercise of a power of appointment reserved by Mrs. Dora B. Donner, a resident of the State of Florida at the date of her death, in an *inter vivos* trust created by her in Delaware by agreement dated March 25, 1935, with Wilmington Trust Company, of Wilmington, Delaware, as Trustee. The trust res has never been outside the State of Delaware and the Trustee has never been in the State of Florida, either *qua* corporation or through its representatives, and has not submitted itself to the jurisdiction of the Courts of that State. The appointees of $417,000.00 of the trust assets are not residents of Florida, have not been personally served with process, and have not submitted themselves to the jurisdiction of the Florida Courts. The Court of Chancery of the State of Delaware and the Supreme Court of that State have decreed that the exercise of the power of appointment was legal and that the $417,000.00 was properly paid by the Trustee to the appointees. The Supreme Court of Florida, however, claiming jurisdiction over the Wilmington Trust Company, as Trustee, and the nonresident appointees by constructive service, has declared that the exercise of the power of appointment was illegal. The Supreme Court of the State of Delaware in its opinion (128 A. Ad 819, 825) (18a) described the litigation in the Supreme Courts of the two States as "*a headlong jurisdictional collision between the States.*"

Dates of Judgment of the Supreme Court of Florida and Its Order Denying Rehearing.

(ii) The date of the judgment of the Supreme Court of Florida sought to be reviewed is September 19, 1956.

Its order denying Appellants' Petition for Rehearing (17a) is dated November 28, 1956. Appellants filed a motion for leave to file an Extraordinary Petition for Rehearing (T. 279) based on the opinion of the Supreme Court of the State of Delaware, which was denied on February 18, 1957. Notice of Appeal was filed on February 21, 1957, in the Supreme Court of Florida (T. 325).

Statutory Provision Believed to Confer on This Court Jurisdiction of This Appeal.

(iii) Appellants believe that 28 U. S. C. Sec. 1257(2) confers jurisdiction of this appeal on this Court.

Cases Believed to Sustain Jurisdiction.

(iv) Appellants believe that the following cases sustain the jurisdiction of this Court:

(1) The application of Chapter 48 Florida Statutes (1953) 48.01 and 48.02 to obtain jurisdiction over nonresident trustees in possession of the trust res and nonresident beneficiaries, all of whom are indispensable parties, violates the Fourteenth Amendment of the Constitution of the United States.

Pennoyer v. Neff, (1878) 95 U. S. 714;

Baker v. Baker, Eccles & Co., (1916) 242 U. S. 394, 403;

Lewis v. Hanson, (Del. Supr. Ct. 1957) 128 A. 2d 819, 834;

Dahnke-Walker Milling Company v. Bondurant, (1921) 257 U. S. 282.

See also:

Riley v. New York Trust Co., (1942) 315 U. S. 343, 353;

Armstrong v. Armstrong, (1956) 350 U. S. 568, 576;

Alton v. Alton, (C. A. 3, 1953) 207 F. 2d 667, 676 (holding that often "due process at home and full faith and credit in another state are correlative").

(I) Trustees having possession of the trust res are indispensable parties.

McArthur v. Scott, (1885) 113 U. S. 340, 396;
Wilson v. Russ, (1880) 17 Fla. 691;
Winn v. Strickland, (1894) 34 Fla. 610, 16 So. 606;
Sadler v. Industrial Trust Co., (S. J. C. Mass. 1951) 97 N. E. 2d 169;
Lewis v. Hanson, supra, 835.

(II) Beneficiaries are indispensable parties to an attack on the validity of the trust.

Guida v. Second Natl. Bank, (S. J. C. Mass. 1948) 80 N. E. 2d 12.

(2) The failure of the Supreme Court of Florida to give full faith and credit to the judgments of the Court of Chancery and the Supreme Court of the State of Delaware violates Article IV of the Constitution of the United States.

Lewis v. Hanson, supra, 831, 832;
Hanson v. Wilmington Trust Co., (Del. Ch. 1956) 119 A. 2d 901;
Riley v. New York Trust Co., supra;
Baker v. Baker, Eccles & Co., supra;
Pennoyer v. Neff, supra.

(3) The failure of the Supreme Court of Florida to apply Delaware law in making its decision constitutes a denial of due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

Home Life Insurance Co. v. Dick, (1930) 281 U. S. 397, 407, 408, 410;
Loucks v. Standard Oil Co., (N. Y. C. of A., 1918) 120 N. E. 198, 202.

Florida Statute Involved.

(v) The full text of the Statute of the State of Florida (Chap. 48, Fla. St. (1953) 48.01 and 48.02, Vol. 1, p. 233), the validity of which is involved in this appeal, is:

48.01. *Service of process by publication, in what cases.*

Service of process by publication may be had, in any of the several courts of this state, and upon any of the parties mentioned in 48.02 in any suit or proceeding:

(1) To enforce any legal or equitable lien upon or claim to any title or interest in real or personal property within the jurisdiction of the court or any fund held or debt owing by any party upon whom process can be served within this state.

(2) To quiet title or remove any encumbrance, lien or cloud upon the title to any real or personal property within the jurisdiction of the court or any fund held or debt owing by any party upon whom process can be served within this state.

(3) For the partition of real or personal property within the jurisdiction of the court;

(4) For divorce or annulment of marriage;

(5) For the construction of any will, deed, contract or other written instrument and for a judicial declaration or enforcement of any legal or equitable right, title, claim, lien or interest thereunder.

(6) For the reestablishment of lost instruments or records which have or should have their situs within the jurisdiction of the court;

(7) In which there shall have been issued and executed any writ of replevin, garnishment or attachment;

(8) In which any other writ or process shall have been issued and executed so as to place any property, fund or indebtedness in custodia legis;

(9) In scire facias to revive a judgment;

(10) In any other suit or proceeding, not hereinabove expressly mentioned, wherein personal service of process or notice is not required by the statutes or constitution of this state or by the Constitution of the United States.

48.02. *Service of process by publication, upon whom.*

Where personal service of process cannot be had, service of process by publication may be had upon any party, natural or corporate, known or unknown, including:

(1) Any known or unknown natural person, and, when described as such, the unknown spouse, heirs, devisees, grantees, creditors or other parties claiming by, through, under or against any known or unknown person who is known to be dead or is not known to be either dead or alive;

(2) Any corporation or other legal entity, whether its domicile be foreign, domestic or unknown, and whether dissolved or existing, including corporations or other legal entities not known to be dissolved or existing, and, when described as such, the unknown assigns, successors in interest, trustees, or any other party claiming by, through, under or against any named corporation or legal entity;

(3) Any group, firm, entity or persons who operate or do business, or have operated or done business, in this state, under a name or title which includes the word "corporation", "company," "incorporated,"

"inc." or any combination thereof, or under a name or title which indicates, tends to indicate or leads one to think that the same may be a corporation or other legal entity; and

(4) All claimants under any of such parties. Unknown parties may be proceeded against exclusively or together with other parties.

QUESTIONS PRESENTED BY THE APPEAL.

(c) The questions presented by the appeal are:

(i) Do the provisions of Chapter 48, Florida Statutes, Sections 48.01 and 48.02, violate the Constitution of the United States (in particular, Section 1 of the Fourteenth Amendment thereto) where said Statute is used by the Supreme Court of Florida as a basis for jurisdiction to decree the devolution of property outside its jurisdiction and in the hands of a trustee who was not personally served with process, who has not appeared in the proceedings and who has no place of business, has never conducted business and has no officers, agents or representatives in the State of Florida?

(ii) Do the provisions of Chapter 48, Florida Statutes, Sections 48.01 and 48.02, violate the Constitution of the United States (in particular, Section 1 of the Fourteenth Amendment thereto) where said Statute (in particular, 48.01 (5)) was used by the Supreme Court of Florida, under the guise of construing a *clear* and *unambiguous* will, for the sole purpose of declaring invalid an *inter vivos* trust whose situs, property and trustee were all outside the jurisdiction of the Court and whose trustee was not personally served with process and did not appear in the proceedings?

(iii) Does the refusal of the Supreme Court of Florida to give full faith and credit to the judgment of the Court of Chancery of the State of Delaware and the Supreme

Court of the State of Delaware, both courts of competent jurisdiction, having control over the trust res, the trustees and all of the beneficiaries of the trust contravene the Constitution of the United States (in particular, Section 1 of Article IV thereof)?

(iv) Did the Supreme Court of Florida err in refusing to apply the law of Delaware in determining the validity of a trust having its situs in Delaware?

(v) Did the Supreme Court of Florida err in holding that the *inter vivos* trust agreement was valid insofar as it created a beneficial life estate in the settlor and that it was republished in Florida so as to become subject to jurisdiction of the Florida Courts for the sole purpose of decreeing its invalidity?

(vi) Did the Supreme Court of Florida err in reaching a conclusion which is totally lacking in comity and is unenforceable in the face of the mandates of the Court of Chancery of the State of Delaware and the Supreme Court of the State of Delaware?

STATEMENT OF THE CASE.

(d) This action was brought for the purpose of determining the validity of the exercise of a power of appointment reserved in an *inter vivos* trust created in Delaware by agreement dated March 25, 1935, between Dora Browning Donner, then a resident of the State of Pennsylvania, and Wilmington Trust Company, a banking corporation of the State of Delaware, having its principal place of business in Wilmington, Delaware, as Trustee (T. 20). On December 3, 1949, after Mrs. Donner had moved to and become a resident of the State of Florida, she executed (and later amended under date of July 5, 1950) her reserved power of appointment (T. 37), appointing the trust funds as follows: $200,000 to each of two trusts for the benefit of Joseph Donner Winsor and Donner Hanson, two of the Appellants

herein, of which Delaware Trust Company, a banking corporation of the State of Delaware, having its principal place of business in Wilmington, Delaware, is Trustee; $10,000 to the Bryn Mawr (Pennsylvania) Hospital; an aggregate of $7,000 to six employees (all non-residents of the State of Florida); and the residue to Elizabeth Donner Hanson, one of the Appellants herein, "as the Executrix of [her] Last Will and Testament to be dealt with by her in accordance with the terms and conditions of said Last Will and Testament * * *".

In her Will, executed on the same day as this power, after disposing of her tangible personal property and directing her Executrix to pay out of her estate "all estate, inheritance, transfer or other succession or death duties, State and Federal, which by reason of [her] death shall become payable upon or with respect to the property appointed by [her] by the exercise of the power of appointment provided in [her] favor in paragraph 1 of a certain trust agreement entered into between [her] and Wilmington Trust Company, a Delaware corporation, as Trustee on the 25th day of March, 1935", she bequeathed one-half of the remainder to Delaware Trust Company as Trustee under a third trust for the benefit of Katherine N. R. Denekla, one of the original Plaintiffs and an Appellee in this action, and the remaining one-half to Elizabeth Donner Hanson, as Trustee of a trust created by said Will for the benefit of Dorothy B. Rodgers Stewart, who through her guardian, Elwyn L. Middleton, is the remaining original Plaintiff and Appellee in this action (T. 14).

Mrs. Donner died on November 20, 1952, and her Will was probated in Palm Beach County, Florida (T. 5).

Wilmington Trust Company, in obedience to the direction of the power of appointment dated December 3, 1949 to pay over the trust fund "as soon as conveniently may be", between January 7, 1953 and February 11, 1953, paid Bryn Mawr Hospital the $10,000 appointed to it and the six employees the $7,000 appointed to them. On March 30,

1953, it delivered to Delaware Trust Company, Trustee of the two trusts for Joseph Donner Winsor and Donner Hanson, securities and cash in the amount of $200,000 for each trust. Wilmington Trust Company continues to hold the residue of the trust estate for the account of the Executrix (T. 132). None of the trust assets have ever been in the State of Florida and neither of the Trust Companies has any office, officers, agents or representatives, or does any business, in that State (T. 129, 130).

After this distribution and after the expiration of the time period within which the Trustee was ordered to make distribution, namely, "not later than twelve months after * * * [Mrs. Donner's] death" (November 20, 1953), Appellees on January 22, 1954 filed this action in the Circuit Court of Palm Beach County, for a determination and declaration "of what portion of the trust property * * * passes under the residuary clause of the will of the decedent". Appellants, all being residents of the State of Florida, were personally served with process and appeared herein through their attorneys. Three of the servants who were appointed to and paid a portion of the trust fund were not named as defendants. The Trust Companies, the Bryn Mawr Hospital and the remaining three servants, all being non-residents, could not be personally served and did not appear. Jurisdiction over them was attempted by constructive service under the provisions of Chapter 48, Florida Statutes, Sections 48.01 and 48.02 (T. 44, 47, 50).

Appellants filed a motion to dismiss the action on the grounds that the Circuit Court lacked jurisdiction over the subject matter of the action for the reasons, inter alia, (1) that none of the corporate defendants or trustees had offices, officers, agents or representatives, or did business, in the State of Florida and there was no res in the State of Florida which would constitute a legal basis for constructive service; (2) that the exercise of jurisdiction under the circumstances would contravene the Constitution and Laws of the State of Florida and the Constitution of the

United States, and, in particular, Section 1 of the Fourteenth Amendment to the United States Constitution; and (3) that the plaintiffs had failed to join and therefore the Court lacked jurisdiction over indispensable parties to the disposition of the suit (T. 47). After hearing, the Circuit Court on April 9, 1954, determined that:

> "Though this suit is primarily concerned with the validity and effect of certain powers of appointment rather than the will, I am inclined to think that the matters sought to be presented by the motion filed February 18, 1954, can best be determined at final hearing." (T. 51)

Ruling was therefore postponed "*until trial and final hearing*".

Appellants petitioned the Supreme Court of Florida for certiorari, which was denied by order dated June 29, 1954 (T. 157).

Appellant, Elizabeth Donner Hanson, as Executrix and Trustee under Mr. Donner's will, then filed an action in the Court of Chancery of the State of Delaware, impleading all interested parties and after reporting to that Court that the complaint in this action charged her with having "failed to take any steps" to "capture" the trust assets, prayed that the Court "determine by declaratory judgment the persons entitled to participate in the assets held in trust by the Wilmington Trust Company * * *" and "enter decrees awarding said funds to the persons entitled thereto" (T. 72).

Appellants then filed their answer in this action appending a copy of the Delaware complaint and reporting to the Circuit Court of Palm Beach County that "intending to meet Plaintiffs' charge that [the Executrix] has failed to take steps to 'capture' assets belonging to said Estate and in order to expedite the final determination of the controversy raised by plaintiffs [she had] on the 28th day of July, 1954, filed in the Court of Chancery of the State

of Delaware, in and for New Castle County, a complaint for declaratory judgment against Wilmington Trust Company as Trustee, the Plaintiffs in this suit and others, asking the Court to determine the parties entitled to participate in the assets held in trust by Wilmington Trust Company * * *.' Appellants' answer avers that the Delaware Court "is the only Court (1) having jurisdiction of the aforesaid trust, the Trustee and the trust assets; (2) which can appropriately and finally determine the validity of said exercise of powers of appointment and (3) whose decree would be entitled to full faith and credit under the Constitution of the United States" (T. 70). The answer renewed Appellants' charge that the Circuit Court of Palm Beach County lacked jurisdiction to finally determine the questions raised by the complaint and prayed that the proceedings be stayed pending the determination of the Delaware Court (T. 68).

On August 25, 1954, the Circuit Court of Palm Beach County denied Appellants' motion for a stay and Appellants again petitioned the Supreme Court of Florida for a writ of certiorari to review said action (T. 168). This was denied by order of that Court dated November 23, 1954.

Appellees and Appellants both filed motions for a Summary Final Decree on the record. Argument was heard by the Circuit Court of Palm Beach County on January 5, 1955, and on January 14, 1955, the Court filed its "Summary Final Decree" holding:

> "As to jurisdiction, the trust assets and the trustee are in Delaware. No personal service has been had upon the defendants who failed to answer * * *. Hence this Court considers that it has no jurisdiction over the non-answering defendants" (T. 138).

The Court thereupon dismissed the action as to the non-answering defendants, but proceeded to hold that "as to the parties now before the Court, the assets held under the provisions of the trust agreement dated March 25,

1935, between the decedent, Dora Browning Donner, and the Wilmington Trust Company, as Trustee, and additions thereto passed under the Will of Dora Browning Donner, dated December 3, 1949, and disposition thereof is determined by the residuary clause of said will * * *" (T. 139).

Appellants petitioned for rehearing primarily on the ground that the Court having found that it lacked jurisdiction over the trustees and over the trust res was necessarily prevented from finally and effectively determining the litigation (T. 140). This petition was denied by order of the Court dated March 3, 1955, after which both Appellants and Appellees appealed to the Supreme Court of Florida (T. 148).

On December 28, 1955, the Court of Chancery of the State of Delaware, after hearing the parties in the action pending before it, and after giving consideration to the proceedings and "Summary Final Decree" of the Circuit Court for Palm Beach County, ruled in an opinion:

1. "Since the purported Trust was created in Delaware and since the assets have been held by the Trustee in Delaware at all times, the 'home' of the Trust is in Delaware and its validity must be determined by the law of Delaware". (T. 191) (119 A. 2d 907).

* * *

2. "It is held that the Agreement of 1935 created a valid *inter vivos* Trust. Since the Trust was valid the exercise of the powers of appointment thereunder by the instruments of 1949 and 1950 were valid * * *. Accordingly, the distributions by Wilmington Trust Company constituted a proper discharge of its duties as Trustee under the Agreement with Mrs. Donner." (T. 201) (119 A. 2d 911)

On January 13, 1955, the Delaware Court entered its final decree which by its terms binds all parties to the litigation, who include all parties to this action, to the declarations, adjudications and determinations thereof (T. 203).

Appellants then filed in the Supreme Court of Florida a petition requesting the Court to remand the action to the Circuit Court with instructions to dismiss upon the basis of the opinion and order of the Delaware Court, copies of which were attached (T. 175). Said petition recited that a petition for rehearing by certain of the defendants in the Delaware litigation urging that the Court give full faith and credit to the "Summary Final Decree" of the Circuit Court of Palm Beach County had been denied after hearing.

Argument on the motion to remand was heard by the Supreme Court of Florida on March 27, 1956, at the same time as the hearing on the appeals.

On September 19, 1956, the Supreme Court of Florida filed its opinion denying said motion to remand and holding that the Circuit Court had jurisdiction of all of the defendants named in this action and that the appointments of the trust property were invalid although the trust itself was valid (T. 239).

Appellants filed a petition for rehearing particularly directing the Court's attention to the questions presented by this appeal as set forth in paragraph (c) hereof (T. 257). This petition was denied on November 28, 1956 (T. 272) and on the same day the Court granted Appellants' petition to stay its mandate pending the completion of its appeal to this Court (T. 277).

On January 14, 1957, the Supreme Court of the State of Delaware (128 A. 2d 819) affirmed the Court of Chancery of that State (T. 283) (18a). A petition for reargument, or, in the alternative for a stay of the mandate of the Delaware Supreme Court to permit appellants to petition this Court for a writ of certiorari, was settled by order of that Court dated February 7, 1957, denying the reargument and granting the stay (44a).

On January 25, 1957, Appellants filed with the Supreme Court of Florida a motion for leave to file an Extraordinary

Petition for Rehearing, based on the final determination of the Delaware Supreme Court, attaching a copy of its opinion to the petition. The Supreme Court of Florida dismissed this motion by order dated February 18, 1957 (T. 323).

THE FEDERAL QUESTIONS ARE SUBSTANTIAL.

(e) Appellants contend that the Federal questions presented by this appeal are substantial upon the following grounds:

(i) (1.) The application of Chapter 48, Florida Statutes, Sections 48.01 and 48.02, to acquire jurisdiction over the nonresident trustee and appointees in this case is a direct violation of the provisions of the Fourteenth Amendment to the Constitution of the United States. This is aptly stated by the Supreme Court of the State of Delaware in its opinion in *Lewis v. Hanson, supra,* as follows:

> "* * * To hold that in the absence of jurisdiction over the *res* in controversy Florida can compel appearance through substituted service would be a violation of the due process clause of the 14th Amendment. Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565." (128 A. 2d 834)

In so holding, the Delaware Court merely underscored the ruling of the Florida Chancellor, who, having found that "the trust assets and the trustee are in Delaware" and that "no personal service has been made upon the defendants who failed to answer," dismissed the case as to them for want of jurisdiction.

(2.) The Delaware Supreme Court also properly held that the trustee was an indispensable party to the litigation, saying:

> "Furthermore, we think it the law that while a *cestui que trust* is bound in most circumstances by an adjudication against his trustee, Iowa-Wisconsin

Bridge Co. v. Phoenix Finance Corp., supra, the converse of that proposition is not the law, particularly when the adjudication affects the existence of the trust itself. It is the duty of a trustee to defend the existence of his trust, 2 Scott on Trusts, § 178, even against an attempt by the settlor and sole beneficiary to overthrow it. Cf. Weymouth v. Delaware Trust Co., 29 Del. Ch. 1, 45 A. 2d 427. A trustee is also an indispensable party to a suit involving the trust property, and in defense of title to the trust property. 54 Am. Jur., Trusts, § 584." (128 A. 2d 834)

(ii) Nor can the Florida Supreme Court justify its jurisdiction by paragraph (5) of Section 48.01 of Chapter 48, Florida Statutes, on the ground that a will is involved and that the will is the *res*. The will is clear and unambiguous, is conceded to be valid, has been admitted to probate and needs no interpretation or construction. The nonresident trustee and appointees are not named as beneficiaries in the will and could have no interest or reason to appear in an action for its construction. For the Supreme Court of Florida to usurp jurisdiction on the basis of paragraph (5) is, we submit, justifiable ground for the conclusion of the Supreme Court of the State of Delaware that the Florida Court had "at best only a shadowy pretense of jurisdiction" (128 A. 2d 835). The action is, as was properly found by the Florida Chancellor in his early pronouncement in the proceedings, "primarily concerned with the validity and effect of certain powers of appointment, rather than the will * * *." (T. 52)

(iii) The Supreme Court of Florida, presumably again attempting to improperly apply Chapter 48, Florida Statutes, Section 48.01 (5), under the guise of the construction of a "written instrument" rather than the "will", resorted to "boot strap lifting" in determining that the trust agreement was valid insofar as it created a valid life estate for Mrs. Donner's benefit and was re-published by her after

she became a resident of Florida, in order to obtain jurisdiction to declare the trust invalid.

Consequently, since there was no personal service or appearance by the nonresident trustee and the appointees, since no trust *res* was ever in Florida which would form the basis for substituted service, since there is no basis for a declaratory decree on the validity, construction, or enforcement of the will, and since the Supreme Court of Florida cannot make the trust a valid Florida trust for the purpose of conferring jurisdiction to destroy it, the attempts of the Court to assume jurisdiction must necessarily violate the Fourteenth Amendment.

(iv) The refusal of the Supreme Court of Florida to give full faith and credit to the judgments of the Delaware Court of Chancery and Supreme Court violates Article IV of the Constitution of the United States. The Delaware Courts, both courts of competent jurisdiction, having control over the trust *res*, the trustee, and also of the beneficiaries, have decreed in the words of Mr. Justice Wolcott, speaking for the Supreme Court:

> "* * * that the agreement of 1935 under the law of Delaware created a valid *inter vivos* trust. Under the law of Delaware, also, we think Wilmington Trust Company was required to transfer the trust assets pursuant to the directions contained in Mrs. Donner's exercise of the power of appointment delivered to it prior to her death." (128 A. 2d 829)

This judgment is binding not only on the parties to the Florida action, but also on the Florida Courts.

(v) The Delaware Court of Chancery and Supreme Court determined that since the trust *res*, the trustee, the administration of the trust, and all of the beneficiaries were in the State of Delaware, and since the trustor evidenced a manifest intention to have Delaware law govern the trust, all questions having to do with the validity and adminis-

tration of the trust must be resolved by Delaware law. In this respect, the Supreme Court concluded:

> "We, therefore, hold that the law of Delaware determines the essential validity of this trust agreement and of the exercise of the power of appointment." (128 A. 2d 826)

In its failure to follow the recognized principle of conflicts of law that the law of the situs of a trust controls and to apply that law, the Supreme Court of Florida denied to the trustee, appointees and appellants their right to due process of law. See *Home Life Insurance Co. v. Dick, supra.*

(vi) The Supreme Court of Florida erred in reaching a conclusion which is totally lacking in comity and is unenforceable in the face of the mandate of the Court of Chancery and the Supreme Court of the State of Delaware. the Supreme Court found that the public policy of the State of Delaware compelled it to ignore the findings of the Florida Court saying:

> "Finally, we think the public policy of Delaware precludes its courts from giving any effect at all to the Florida judgment of invalidity of the 1935 trust. We are dealing with a Delaware trust. The trust *res* and trustee are located in Delaware. The entire administration of the trust has been in Delaware. The attack on the validity of this trust raises a question of first impression in Delaware and one of great importance in our law of trusts. To give effect to the Florida judgment would be to permit a sister state to subject a Delaware trust and a Delaware trustee to a rule of law diametrically opposed to the Delaware law. It is our duty to apply Delaware law to controversies involving property located in Delaware, and not to relinquish that duty to the courts of a state having at

best only a shadowy pretense of jurisdiction. Cf. *Taylor v. Crosson*, 11 Del. Ch. 145, 98 A. 375." (128 A. 2d 835)

The converse is true. Comity requires the Courts of Florida to recognize the Delaware Courts' direct and primary authority over property and persons within its jurisdiction.

Finally, we submit that this Court should resolve the questions raised in this action in which the Courts of the States of Florida and Delaware are diametrically opposed in their application of the substantive law and thereby put an end to further litigation. Such litigation to surcharge appellant, Elizabeth Donner Hanson, for failure to "capture assets" has been threatened throughout these proceedings. But when she attempted to obtain these assets by her interpleader action in the Court of Chancery of the State of Delaware, the only court of competent jurisdiction for that purpose, the Florida Chancellor, at Appellees' insistence, enjoined her. Any litigation to so surcharge Mrs. Hanson must eventually find its way back to this Court if the questions herein presented are not presently resolved in this action.

OPINIONS AND ORDERS APPENDED.

(f) The following are appended hereto:

(i) Summary Final Decree of the Circuit Court for the Fifteenth Judicial Circuit in and for Palm Beach County dated January 14, 1955 (1a).

(ii) Opinion of the Supreme Court of Florida dated September 19, 1956 (4a).

(iii) Order of the Supreme Court of Florida denying Appellants' Petition for Rehearing dated November 28, 1956 (17a).

(iv) Opinion of the Supreme Court of the State of Delaware dated January 14, 1957 (18a).

(v) Order of Supreme Court of the State of Delaware denying petition for reargument and granting to Appellants in that Court a stay of its mandate to permit them to petition this Court for a writ of certiorari, dated February 7, 1957 (44a).

Respectfully submitted,

WILLIAM H. FOULK,
229 Delaware Trust Bldg.,
Wilmington 1, Delaware,
MANLEY P. CALDWELL,
CALDWELL, PACETTI, ROBINSON & FOSTER,
501 Harvey Building,
West Palm Beach, Florida,
Attorneys for Elizabeth Donner Hanson, Individually, as Executrix of the Will of Dora Browning Donner, Deceased, and as Guardian ad Litem for Joseph Donner Winsor and Donner Hanson, and William Donner Roosevelt, Appellants.

Of Counsel:

EDWARD MCCARTHY,
MCCARTHY, LANE & ADAMS,
423 Atlantic Bank Bldg.,
Jacksonville, Florida,
Attorney for Elizabeth Donner Hanson as Guardian ad Litem for Joseph Donner Winsor and Donner Hanson.

Appendix.

CHANC ORDERS 234 PAGE 632

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY. IN CHANCERY.

KATHERINE N. R. DENCKLA, ETC., ET AL., *Plaintiffs*,

v.

WILMINGTON TRUST COMPANY, a Delaware Corporation, et al., *Defendants*.

No. 31,980,

SUMMARY FINAL DECREE.

This cause was duly presented by counsel for the parties upon Motion for Summary Final Decree filed by plaintiff November 19, 1954 and Motion for Summary Decree filed by certain defendants on December 3, 1954.

Only questions of law are presented. The facts are simple and undisputed. No useful purpose would be served in stating them.

Two principal questions are presented, first, jurisdiction as against those whom a decree pro confesso has been entered; secondly, the authority of an executrix of a Florida will concerning certain assets now located in Delaware and purported to be held under a declaration of trust and power of appointment executed by the testator.

As to jurisdiction, the trust assets and the trustees are in Delaware. No personal service has been had upon the defendants who failed to answer. The inclusion of the trust assets in her inventory, and an allowance of counsel fees and compensation for the executrix, although such an inclusion was later sought to be withdrawn, does not of itself give this court jurisdiction over these assets in Dela-

ware or the Trustees. Hence, this court considers that it has no jurisdiction over the non-answering defendants.

Concerning the declaration of trust dated March 25, 1935, and particularly the power of appointment dated December 3, 1949, no present interest passed to any beneficiary other than the Trustor (Testatrix). It seems clear to me, from the authorities, that the power of appointment was testamentary in character and did not constitute a valid inter vivos trust appointment. As the appointment had only one subscribing witness, rather than two, as required in Florida, it did not constitute a valid testamentary disposition. Hence, the executrix should receive the assets and dispose of them agreeable to the will under which she was appointed.

THEREUPON, IT IS ORDERED that this cause be dismissed, without prejudice, as to the non-answering defendants; that the Motion filed February 18, 1954, and the Motions for Summary Final Decree be granted to the extent embraced in this decree, and in other respects denied.

IT IS FURTHER ORDERED AND DECREED that, as to the parties now before the court, the assets held under the provisions of the trust agreement dated March 25, 1935, between the decedent, Dora Browning Donner, and Wilmington Trust Company, as Trustee, and additions thereto, passed under the will of Dora Browning Donner, dated December 3, 1949, and disposition thereof is determined by the residuary clause of the will, which was admitted to probate in the County Judge's Court, in Palm Beach County, December 23, 1952.

IT IS FURTHER ORDERED that this court retain jurisdiction for the purpose of enforcing this decree and the settlement of any other questions that may properly arise in connection herewith, all with costs taxed against the executrix.

Copy furnished counsel.

DONE AND ORDERED this 14 day of January, A. D. 1955.

C. E. CHILLINGWORTH,
Circuit Judge.

STATE OF FLORIDA,
COUNTY OF PALM BEACH,

I HEREBY CERTIFY that the above and foregoing is a true and correct copy of a SUMMARY FINAL DECREE filed in my office on the 14 day of Jan., A. D. 1955, and recorded in CHANCERY ORDER BOOK 234 at page 632.

WITNESS my hand and official seal this 17 day of Jan., A. D. 1955.

J. ALEX ARNETTE,
Clerk of Circuit Court.

By /s/ MAMIE L. HARMAN,
Deputy Clerk.

(Seal)

Filed this 14th day of January, 1955 at 2:00 P. M. and recorded in CHANCERY ORDER BOOK, No. 234 at Page 632. Record verified.

J. ALEX ARNETTE,
Clerk,

By: THADDIE P. PLANT, D. C.

IN THE SUPREME COURT OF FLORIDA

JUNE TERM, A. D. 1956

SPECIAL DIVISION A.

ELIZABETH DONNER HANSON, Individually and as Executrix, et al.,
Appellants,

v.

KATHERINE N. R. DENCKLA, Individually, et al.,
Appellees.

Case No. 27,622

OPINION.

Opinion filed September 19, 1956.

An Appeal from the Circuit Court for Palm Beach County, C. E. Chillingworth, Judge.

Caldwell, Pacetti, Robinson & Foster and Manley P. Caldwell for Elizabeth Donner Hanson, Individually, as Executrix of the Will of Dora Browning Donner, Deceased, as Guardian Ad Litem for Joseph Donner Winsor and Donner Hanson and William Donner Roosevelt, Individually; McCarthy, Lane & Adams, Edward McCarthy and William H. Foulk (Wilmington, Delaware) for Elizabeth Donner Hanson as Guardian Ad Litem for Joseph Donner Winsor and Donner Hanson, Appellants.

C. Robert Burns and Redfearn & Ferrell, for Appellees.

HOBSON, *J.*:

This is an appeal by defendants from a summary final decree holding that assets of a trust created by Dora Donner during her lifetime passed under her will. Cross-

assignments of error have been filed by the plaintiffs, who contend that the chancellor erred in holding that he had no jurisdiction over some of the defendants, the trustee and certain beneficiaries under the trust, who did not answer the complaint.

The essential facts of the case are not in dispute. Dora Donner died in Palm Beach, Florida, on November 20, 1952, leaving a will dated December 3, 1949, which was probated in Palm Beach County. She was formerly a citizen of Pennsylvania, but made her permanent home in Palm Beach County on or about January 15, 1944, and remained domiciled in Florida until she died.

On March 25, 1935, the testatrix executed a trust instrument in which she named the Wilmington Trust Company, a Delaware corporation, as trustee. The trust instrument provided in part as follows:

> "Trustee shall pay over the net income of the trust fund unto Trustor, for and during the term of her natural life. Upon the death of Trustor Trustee shall assign, transfer, convey and deliver this trust fund, principal and undistributed income thereof, if any, free from this trust, unto such person or persons and in such manner and amounts and upon such trusts, terms and conditions as Trustor shall have appointed by the last instrument in writing which she shall have executed and delivered to Trustee, or failing such instrument, by her last Will and Testament, or in default of any such appointment then unto the then living issue of Trustor, per stirpes and not per capita."

The trust assets consisted entirely of intangible personalty.

On April 6, 1935, Mrs. Donner executed a power of appointment under the terms of the trust. On October 11, 1939, she executed a new power of appointment, amending the previous power.

On December 3, 1949, (the same day she executed her will, and while domiciled in Florida) Mrs. Donner executed

an instrument entitled "DONNER * FIRST POWER OF APPOINTMENT" wherein she revoked all previous exercises of the power of appointment under the trust and ordered that certain sums be paid to a different set of beneficiaries.

On July 7, 1950, she executed an instrument entitled "DONNER * SECOND POWER OF APPOINTMENT" amending the instrument of December 3, 1949. This was the last "power of appointment" the testatrix exercised before her death.

In her will, after making certain specific directions and bequests, the testatrix provided in part as follows:

> "FIFTH: All the rest, residue and remainder of my estate, real personal and mixed, whatsoever and wheresoever the same may be at the time of my death, *including any and all property, rights and interest over which I may have power of appointment which prior to my death has not been effectively exercised by me* or has been exercised by me in favor of my Executrix, I direct my Executrix to deal with as follows, namely:" [Here follow certain directions and the names of residuary legatees, plaintiff-appellees here.] (Emphasis supplied.)

The complaint for declaratory decree in this case was filed for the purpose of determining what passes under the residuary clause of the will quoted above. This determination, of course, requires a study of the trust agreement of March 25, 1935, and the powers of appointment exercised thereunder, to determine whether or not such powers as the testatrix had were "effectively exercised" under the terms of the will. On this issue, the chancellor held in part:

> "Concerning the declaration of trust dated March 25, 1935, and particularly the power of appointment dated December 3, 1949, no present interest passed to any beneficiary other than the Trustor (Testatrix). It seems clear to me, from the authorities, that the power of appointment was testamentary in character

and did not constitute a valid inter vivos trust appointment. As the appointment had only one subscribing witness, rather than two, as required in Florida, did not constitute a valid testamentary disposition. Hence, the executrix should receive the assets and dispose of them agreeable to the will under which she was appointed."

After this final decree was entered, a suit which had been brought in Delaware by Elizabeth Donner Hanson, as executrix and trustee under the Donner will (one of the appellants herein) to determine the validity of the trust agreement resulted in a summary judgment of the Court of Chancery of the State of Delaware in and for New Castle County, holding that the trust was valid. An appeal from this judgment is pending in Delaware but, so far as the record here before us shows, has not yet been determined.

Appellants have lodged with us a copy of the Delaware chancellor's opinion and judgment and, on the basis thereof, have moved to remand the instant case with directions to dismiss it, taking the position that the Delaware judgment is dispositive of the main issue raised on this appeal.

We shall first consider the contention of appellants that the circuit court of Palm Beach County erred in holding the trust and the powers of appointment exercised thereunder invalid as testamentary in character. As a preliminary inquiry, it is necessary to determine whether or not jurisdiction existed in the courts of Florida to pass upon the validity of these instruments.

There can be no doubt that the court below possessed substantive jurisdiction to determine this issue. Jurisdiction existed by virtue of the will, which had been duly probated in Florida, the testatrix' domiciliary state. Reference having been made in the will, as we have seen, to powers of appointment, and the question of effective exercise thereof having been properly raised, the chancellor

below had no alternative but to examine the trust instrument and documents executed thereunder and declare them valid or invalid. This is to be distinguished from a case wherein questions of administration or validity of a purported inter vivos trust arise absent a will or any reference therein. Cf. *Wilmington Trust Co. v. Wilmington Trust Co.*, Del., 24 A. 2d 309, wherein the settlor had executed a will "making no reference whatever to the power of appointment conferred on him by the [previously executed] trust agreement . . ." and it was held that the Delaware courts had jurisdiction to determine the validity of trust powers, although the settlor died a domicilary of another state. In the case now presented, it would have been an abdication or abandonment of jurisdiction, which we would have been obliged to correct, if the chancellor below had failed to answer the question which was duly brought before him for adjudication.

The next question is the source of the applicable law to test the validity of the attempted trust disposition. The trustee, Wilmington Trust Company, is a Delaware corporation with its principal place of business in Delaware. Securities representing the intangible personalty which forms the corpus of the trust are also located in Delaware. The settlor was domiciled in Pennsylvania when she executed the original trust instrument. The first two "powers of appointment", now revoked, were executed while the settlor was domiciled in Pennsylvania. But these considerations alone are insufficient to persuade us that the law of either Delaware or Pennsylvania is applicable, for reasons which will hereinafter appear.

Assuming, for the moment, that this was an inter vivos trust, the only exercises of the power of appointment which could have been intended to create an interest to be enjoyed at the settlor's death were those reflected in the documents of 1949 and 1950. The settlor obviously intended these documents, if any, to make the controlling disposition; for she revoked all previous exercises of the

power and even called the 1949 and 1950 papers the "first" and "second" power of appointment respectively, although she had previously executed similar instruments. The chancellor in Delaware, in expressing his opinion that the trust was valid under Delaware law, sanctioned payment to the remaindermen named in these last two powers of appointment. In the last analysis we, too, are concerned with the interests of these remaindermen in our inquiry as to whether or not the instruments which created their interests were effective to shift the trust property out of the estate of the testatrix. We do not question the validity of the beneficial life estate reserved by the settlor.

It is urged upon us that the remaindermen possessed during the life of the settlor a present right ot (sic) future enjoyment of the trust property. In making this argument, appellants state in part in their brief that:

> ". . . since the right to amend is specifically reserved in the Trust Agreement of March 25, 1935, *each appointment should be construed as an amendment to and a republication of the original agreement.* Therefore, the trust agreement and appointments thereunder must always be construed together." (Emphasis supplied.)

In *Henderson v. Usher*, 118 Fla. 688, 160 So. 9, we observed that an inter vivos trust usually has its situs at the residence of the creator of the trust, and we were considerably influenced in our consideration of this principle by the case of *Swetland v. Swetland*, 105 N. J. Eq. 608, 149 A. 50; Id., 107 N. J. Eq. 504, 153 A. 907, which we viewed as "one of the leading cases in this country on the question". In the *Swetland* case the settlor had amended the trust, but had been domiciled in New Jersey both at the time of his execution of the original trust agreement and the amendment thereto. It was held that New Jersey law applied to test both agreements. The court in the *Swetland* case rejected the contention that the applicable law as to the trust necessarily followed the settlor wherever he might be

domiciled after the trust was executed, and it is unnecessary for us to express any opinion regarding this principle. It is sufficient to observe that in the instant case the last effective acts, if any there were, of the settlor to establish remainder interests under the trust were accomplished while she was a Florida domiciliary, and we consider the last powers of appointment as a republication of the original trust instrument, or as if the trust instrument had been executed while the settlor was domiciled in Florida. We consider this a far more realistic interpretation of these instruments than if we were to rule that the last powers of appointment should be construed to relate back to the date upon which the original trust agreement was executed, because the effect of a "relation-back" view would be to establish an artificially early date for interests which were obviously not intended to be created by the settlor until much later. Hence we must consider the validity of the trust, and the remainder interests it sought to create, under Florida law, *Henderson v. Usher*, supra, 118 Fla. 688, 160 So. 9. Compare the rule sustaining the power of the domiciliary state to tax, and apply its tax law to, the exercise of a power to dispose of intangibles, although the trust fund and trustee are outside the state. *Graves v. Schmidlapp*, 315 U. S. 657, 86 L. Ed. 1097; *Bullen v. Wisconsin*, 240 U. S. 625, 60 L. Ed. 830.

The logic of the foregoing analysis is strongly buttressed in the instant case by the fact that the settlor chose, after she had come to Florida, which was to be her last domicile, to make an integrated pattern of arrangements for the disposition of her property. At this period of her life she desired to make final exercise of whatever powers she might have had under the earlier arrangement but was careful to provide in her will for the possible ineffectiveness of such exercise of power, making an unquestionably valid testamentary disposition to settle her entire estate if the doubtful powers of appointment failed.

Having decided that Florida law applies, we are next obliged to apply it. The validity of an attempted inter vivos trust such as this is a matter of first impression in this state. The trust instrument provided, as we have seen, that the settlor would receive all of the net income for life. The settlor reserved to herself the right to amend or revoke the trust agreement in whole or in part at any time. Many powers of the trustee could ordinarily be exercised by it only upon the written direction of, or with the written consent of, the "adviser" of the trust. These powers were the following:

> "(b) To sell at public or private sale, exchange for like or unlike property, convey, lease for terms longer or shorter than the trust, and otherwise dispose of any or all property, real or personal, held in the trust fund, for such price and upon such terms and credits as Trustee may deem proper.
>
> "(c) To invest the proceeds of any such sale or sales, and any other money available for investment, in such stocks, bonds, notes, securities and/or other income producing property as may be deemed appropriate for this trust fund, irrespective of the rules of investment applying to trustees under any present or future laws of the State of Delaware or elsewhere.
>
> • • •
>
> "(e) To participate in any plan or proceeding for protecting or enforcing any right, obligation or interest arising from any stock, bond, note or security held in the trust fund, or for reorganizing, consolidating, merging or adjusting the finances of any corporation issuing the same, to accept in lieu thereof any new or substituted stocks, bonds and/or securities, to pay any assessment or any expense incident thereto, and to do any other act or thing that Trustee may deem necessary or advisable in connection therewith."

As "advisor" the settlor named her husband or "such other person or persons as trustor may nominate in writing delivered to trustee during her lifetime". Finally, and very significantly, the settlor reserved to herself the power of appointment, which we have discussed above, with a view to naming beneficiaries to take remainder interests in the trust after her death.

Although any of these reservations of power in the settlor, standing alone, might not have been enough to render the trust invalid (cf. *Williams v. Collier*, 120 Fla. 248, 162 So. 868, wherein we upheld a revocable trust reserving a life interest to the settlor, with remainder payable to named grandchildren) the cumulative effect of the reservations was such that the relationship established divested the settlor of virtually none of her day-to-day control over the property or the power to dispose of it on her death, and the trust was illusory. See *Burns v. Turnbull*, 294 N. Y. 889, 62 N. E. 2d 785; *In re Tunnell's Estate*, 325 Pa. 554, 190 A. 906; *In re Shapley*, 353 Pa. 499, 46 A. 2d 227; *Hurley's Estate*, 17 Pa. D. & C. 637; *Warsco v. Oshkosh Savings & Trust Co.*, 183 Wis. 156, 196 N. W. 829; *Steinke v. Sztanka*, 364 Ill. 334, 4 N. E. 2d 472. In Scott, Trusts and the Statute of Wills, 43 Harv. L. R. 521, 529, the author states:

> "Suppose that the settlor reserves not merely a life interest and a power to revoke the trust in whole or in part and to modify the trust, but reserves also a power to control the trustee in the administration of the trust. In such a case, there is authority to the effect that the trust is in substance testamentary and is invalid unless declared in an instrument executed in accordance with the requirements of the Statute of Wills."

Another common principle is reflected in Restatement of Trusts, Sec. 56, which reads as follows:

> "Where the owner of property purports to create a trust inter vivos but no interest passes to the bene-

ficiary before the death of the settlor, the intended trust is a testamentary trust and is invalid unless the requirements of the statutes relating to the validity of wills are complied with."

Appellants contend that Illustration 8 under Subsection g. of this section is "exactly our case". This illustration reads as follows:

> "8. A transfers certain securities to B in trust to pay the income to A for life and upon A's death to convey the securities to such person as may be designated in a letter to be delivered by A to B on the following day. On the following day A delivers a letter to B designating C as the person entitled to receive the securities on A's death. A valid trust for C is created, since an interest passes to C during the life of A."

The above illustration represents the instant trust in some particulars, but is an oversimplification of the facts before us. It relates to a single exercise of a power of appointment, rather than frequently revoked and amended exercises of power, such as appear in the case before us, which would demonstrate that the settlor considered the appointments to be ambulatory in nature and exactly like successive wills or codicils in their operation. The illustration given, moreover, does not consider the element of control, which we have discussed above. This is treated in Sec. 57 of the Restatement, Subsection g. of which reads in part as follows:

> "If the settlor reserves a beneficial life estate and power to revoke or modify the trust and such power to control the trustee as to the details of the administration of the trust that the trustee is his agent, the intended disposition so far as it is intended to take effect after his death is invalid unless the requirements of the Statute of Wills are complied with, but the intended trust is valid so far as the beneficial life estate of the settlor is concerned."

Illustration 5 reads as follows:

> "5. A, the owner of shares of stock, delivers the certificates to the B Trust Company to hold and deal with as custodian, to receive the income and pay it over to A, and with power to sell the shares and to reinvest the proceeds. In order to carry out these purposes the shares are registered in the name of the trust company. A writes a letter to the trust company directing it to convey the shares on A's death to C, unless A should otherwise direct. A dies. The intended disposition in favor of C is testamentary, and C is not entitled to the shares unless the requirements of the Statute of Wills are complied with."

True it is that in the situation posed in Illustration 5 the action taken by A, the settlor, is somewhat less formal than the action taken by the settlor herein, and while this is a circumstance which would tend to uphold the validity of the instant trust, we do not consider it controlling when weighed against the multiple reservations of power we have discussed.

We reemphasize that we do not, and need not, hold that the reservation of the power of appointment, or any other factor standing alone, would suffice to invalidate the remainder interests sought to be created under this trust. It is enough to observe that if, as to the remaindermen, this trust is not invalid as an agency agreement, and testamentary as the court below found, it is difficult to understand what further control could be retained by a settlor to produce this result, and the principles to which we have alluded above would lose their meaning. We have been shown no error in the chancellor's ruling on this aspect of the case, which accordingly must be affirmed.

We next consider the contention made on the cross-appeal that the chancellor erred in ruling that he lacked jurisdiction over the persons of certain absent defendants, summoned to appear by constructive service of process.

These defendants were the trustee and persons who would benefit under the last power of appointment executed under the trust, and against the will. In *Henderson v. Usher*, supra, 160 So. 9, we upheld constructive service of a citizen of New York, although the trust "res", consisting entirely of intangible personalty, was physically located in New York, and the trust was administered there by the Chase National Bank of New York, as trustee. We held that constructive service was valid in that state of the record because substantive jurisdiction existed in the Florida court by virtue of construction of a will, which was also involved, the testator having been domiciled in Florida. We observed that it was not essential that the assets of the trust be physically in this state in order that constructive service be binding upon a non-resident where the problem presented to the court was to adjudicate, inter alia, the status of the securities incorporated in the trust estate and the rights of the non-resident therein. It is entirely consistent with the *Henderson* case to hold, as we do, that the court below erred in ruling that it lacked jurisdiction over the persons of the absent defendants. With this view of the case, we need not consider the contention of cross-appellees that the absent defendants are necessary parties under *Martinez v. Balbin*, Fla., 76 So. 2d 488.

Finally, we mention again the motion to remand on the basis of the decree of the Delaware court. Since we hold that we have jurisdiction of the matter presented, and that Florida law is exclusively applicable thereto, this motion must be denied.

Affirmed in part; reversed in part.

TERRELL, *Acting Chief Justice*, THORNAL and O'CONNELL, *JJ.*, concur.

IN THE SUPREME COURT OF FLORIDA:

I, GUYTE P. MCCORD, Clerk of the Supreme Court of Florida, do hereby certify that the above attached and twelve foregoing pages is a true and correct copy of the Opinion and Judgment of the Supreme Court of Florida in that certain cause recently pending in said Court wherein Elizabeth Donner Hanson, individually and as executrix, et al., were appellants, and Katherine N. R. Denckla, individually, et al., were appellees, which was filed in said Court on September 19th, 1956, all as the same appears among the records and files of my said office. This Opinion and Judgment will not become final until after fifteen days from the date of filing said Opinion as aforesaid and if a petition for rehearing is filed within said fifteen-day period it will not become final until the petition for rehearing is acted on and disposed of.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the Supreme Court of Florida, at Tallahassee, the capital, on this the 21st day of September, A. D. 1956.

GUYTE P. MCCORD,
Clerk of the Supreme Court of Florida.

IN THE SUPREME COURT OF FLORIDA.

June Term, A. D. 1956.

Wednesday, November 28, 1956.

ELIZABETH DONNER HANSON, INDIVIDUALLY AND AS EXECUTRIX, ET AL.,

Appella

v.

KATHERINE N. R. DENCKLA, INDIVIDUALLY, ET AL.,

Appell

ORDER.

The petition for rehearing filed by the appellants in above cause has been considered and said petition is den

A True Copy

Test:

/s/ GUYTE P. MCCORD,

Clerk Supreme Court. (Seal)

IN THE SUPREME COURT OF THE STATE OF DELAWARE.

No. 8, 1956.

DORA STEWART LEWIS, MARY WASHINGTON STEWART BORIE and PAULA BROWNING DENCKLA,
Defendants Below, Appellants,

v.

ELIZABETH DONNER HANSON, as Executrix and Trustee under the Last Will of Dora Browning Donner, deceased,
Plaintiff Below, Appellee,

WILMINGTON TRUST COMPANY, a Delaware corporation, as Trustee under three separate Agreements, (1) and (2) with William H. Donner dated March 18, 1932 and March 19, 1932, and (3) with Dora Browning Donner dated March 25, 1935,
Defendant Below, Appellee,

DELAWARE TRUST COMPANY, a Delaware corporation, as Trustee under three separate Agreements (1) with William H. Donner dated August 6, 1940, and (2) and (3) with Elizabeth Donner Hanson, both dated November 26, 1948,
Defendant Below, Appellee,

KATHERINE N. R. DENCKLA,
Defendant Below, Appellee,

ROBERT R. WALLS, ESQUIRE, Guardian ad litem for Dorothy B. R. Stewart and William Donner Denckla,
Defendant Below, Appellee,

ELWYN L. MIDDLETON, Guardian of the property of Dorothy B. R. STEWART, a mentally ill person,
Defendant Below, Appellee.

EDWIN D. STEEL, JR., ESQUIRE, Guardian ad litem for Joseph Donner Winsor, Curtin Winsor, Jr., and Donner Hanson,

Defendant Below, Appellee,

BRYN MAWR HOSPITAL, a Pennsylvania corporation, MIRIAM V. MOYER, JAMES SMITH, WALTER HAMILTON, DOROTHY A. DOYLE, RUTH BRENNER and MARY GLACKENS,

Defendants Below, Appellees,

LOUISVILLE TRUST COMPANY, a Kentucky corporation, as Trustee for Benedict H. Hanson, and as Trustee under agreements with William H. Donner,

Defendant Below, Appellee,

WILLIAM DONNER ROOSEVELT, JOHN STEWART and BENEDICT H. HANSON,

Defendants Below, Appellees

OPINION.

(January 14, 1957)

WOLCOTT and BRAMHALL, *Justices*, and CAREY, *Judge*, sitting.

Appeal from a judgment of the Court of Chancery of New Castle County.

Arthur G. Logan and Aubrey B. Lank, of Wilmington, for appellants.

Robert B. Walls, Jr., Guardian *ad litem* for Dorothy B. R. Stewart and William Donner Deneckla, appellee *pro se*.

Caleb S. Layton, of Wilmington, for Wilmington Trust Company, appellee.

David F. Anderson, of Wilmington, for Delaware Trust Company, appellee.

Edwin D. Steel, Jr., Guardian *ad litem* for Joseph Donner Winsor, Curtin Winsor, Jr., and Donner Hanson, appellee *pro se*.

WOLCOTT, *J.*:

This appeal involves two fundamental questions: (1) Whether a purported *inter vivos* trust and the exercise of a power of appointment under it are valid or invalid; and (2) Whether the parties may litigate the question of validity in a Delaware court because of an adverse adjudication upon the point by a Florida court.

The action below, commenced by Elizabeth Donner Hanson[1] as the Florida executrix of the settlor's will and, also, in her capacity as trustee under the residuary clause of that will, seeks a declaratory judgment establishing the persons entitled to $417,000 which was distributed by the *inter vivos* trustee pursuant to the exercise of the power of appointment.

The parties named as defendants in the action include Wilmington Trust Company, trustee under the trust agreement in question and, as such, t distributor of the $417,000, Delaware Trust Company, trustee, the recipient of $400,000 of the trust assets, the recipients of the balance of $17,000, and all possible claimants of the trust corpus, either under the exercise of the power of appointment or under the settlor's Florida will.

The cause came up for decision below on four cross-motions for summary judgment. It will suffice to state that the defendants divide themselves into two contending groups. One group, which we will call the "Lewis Group", maintains that the trust agreement is invalid as an *inter vivos* trust instrument and that, accordingly, the exercise of the power of appointment was testamentary in character and, as such, ineffective under Florida law to pass any interest. The Lewis Group contends that the entire trust corpus comprises part of the Florida estate of the settlor and passes under her will.

---

1. Since its institution, she has been enjoined by the Florida court from prosecuting the action. Since that time, neither she nor her counsel has taken any part in the litigation.

The second group, which we will call the "Hanson Group" maintains that the trust agreement is valid and that, accordingly, the transfer of $417,000 pursuant to the exercise of the appointment is legally sufficient to pass title. Needless to say, the adoption of the contention of one group will benefit it financially to the loss of the other.

The Acting Vice Chancellor granted summary judgment in favor of the Hanson Group, holding that the trust agreement was a valid *inter vivos* trust; that the exercise of the power of appointment was effective to pass title to the $417,000, and that there was no estoppel resulting from the Florida judgment. From this decision the Lewis Group appeals.

The facts are not in dispute. On March 25, 1935, Dora Browning Donner (hereafter Mrs. Donner), then being a resident of Pennsylvania, entered into a trust agreement with Wilmington Trust Company and deposited certain securities with it as the trust corpus. By the terms of the agreement Wilmington Trust Company was directed to manage, invest and reinvest the trust corpus and to pay over the net income to Mrs. Donner for her life who reserved to herself a power of appointment of the corpus exercisable either by instrument or by will. Failing the exercise of the power, the agreement directed that the trust corpus be distributed by the trustee at her death to her issue surviving, or to her next of kin.

Specific powers were conferred upon Wilmington Trust Company, as trustee, which in substance were the ordinary powers granted to a trustee. However, it was specified that Wilmington Trust Company could exercise certain of the powers "only upon the written direction of, or with the written consent" of a trust advisor. These powers were (1) to sell trust assets, (2) to invest proceeds of sale of trust property, and (3) to participate in mergers and reorganizations of corporations whose securities were held as part of the trust assets.

In the agreement, Mrs. Donner designated a trust advisor and reserved the right to nominate other advisors at any time during her lifetime. She also reserved the right to amend, alter or revoke the agreement in whole or in part at any time, as well as the right to change from time to time the trustee. On one occasion, she withdrew $75,000 from the trust corpus, which sum she later replaced.

On two different occasions prior to 1949, Mrs. Donner executed instruments exercising the power of appointment. Finally, on December 3, 1949,[2] by a non-testamentary instrument, she exercised the power of appointment, specifically revoking the earlier exercises by her of the power, and directing the Wilmington Trust Company, six months after her death, to pay over a total of $17,000 to Bryn Mawr Hospital and certain family retainers, $200,000 to Delaware Trust Company in trust for Joseph Donner Winsor, $200,000 to Delaware Trust Company in trust for Donner Hanson, and the residue of the corpus to the executrix of her will.

In 1944, Mrs. Donner changed her residence from Pennsylvania to Palm Beach County, Florida where she was domiciled at her death in 1952. Her will was probated in Florida and Elizabeth Donner Hanson duly qualified as executrix. The residuary clause of her will directed her executrix to pay from the residuary estate, which specifically included the balance of the trust corpus not appointed in her lifetime, all death taxes on property appointed from the trust corpus during her lifetime, and to divide the balance remaining into two equal parts, one part to be transferred to Delaware Trust Company in trust for Katherine N. R. Denckla, a daughter; and the other part to be transferred to Elizabeth Donner Hanson in trust for Dorothy B. R. Stewart, another daughter, for her life, and upon her death to Delaware Trust Company in trust for Katherine Denckla.

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2. Later amended in a minor aspect.

At the death of Mrs. Donner the trust corpus held by Wilmington Trust Company amounted to in excess of $1,490,000. Thereafter, pursuant to the directions contained in the exercise of the power of appointment Wilmington Trust Company distributed assets in the aggregate amount of $417,000 and transferred a portion of the balance of the corpus to the executrix of the will of Mrs. Donner.

In January, 1954 the two residuary beneficiaries under the will of Mrs. Donner [3] brought an action for declaratory judgment in Palm Beach County, Florida against Mrs. Hanson, individually and as executrix, Wilmington Trust Company, Delaware Trust Company, and some of the other possible claimants to the assets passing under the residuary clause of the will of Mrs. Donner.[4] In this action a judgment was sought determining what property passed under the will of Mrs. Donner, and the authority of the executrix over the assets held by Wilmington Trust Company under the 1935 agreement.

Neither Wilmington Trust Company nor Delaware Trust Company were served personally in the Florida action, nor did either of them appear. None of the trust assets held by Wilmington Trust Company has ever been held or administered in Florida, nor has Wilmington Trust Company ever done business in the State of Florida.

On January 14, 1955 the Circuit Court of Palm Beach County, Florida entered a decree [5] holding that it lacked jurisdiction over the trust assets in Delaware and over Wilmington Trust Company, Delaware Trust Company and the other non-answering defendants, and directed that the complaint be dismissed without prejudice as to all of them. It was also held that no present interest passed to any

3. Katherine Denckla appeared in her own person. Dorothy Stewart appeared by a guardian.

4. Some of the family retainers, the recipients of a total of $3,000 from the distribution pursuant to the exercise of the power of appointment, were not named as parties.

5. The Florida decree was entered after the instituting of suit in Delaware by the executrix.

beneficiary other than Mrs. Donner under the agreement of 1935 and that the exercise of the power of appointment by her was testamentary in character and, as such, invalid under Florida law because it was not subscribed by two witnesses. It was held, therefore, that the assets held by Wilmington Trust Company passed under the will of Mrs. Donner, and that the distribution thereof was to be made in accordance with the residuary clause.

Thereafter, an appeal was taken to the Supreme Court of Florida by the equivalent of the Hanson Group seeking a reversal of the holding of invalidity of the 1935 trust and the exercise of the power of appointment. Similarly, the equivalent of the Lewis Group by cross-appeal sought a reversal of the holding of lack of jurisdiction over Wilmington Trust Company and Delaware Trust Company.

The Supreme Court of Florida handed down its opinion (not yet reported) affirming that portion of the decree adjudging the invalidity of the trust and the exercise of the power of appointment, and reversing that portion of the decree holding that Florida had no jurisdiction over Wilmington Trust Company and Delaware Trust Company.

In the interim, while the appeal was pending in Florida, the Lewis Group perfected its appeal in this court from the judgment of the Acting Vice Chancellor and argued it before us.

In the argument and on the briefs, the main emphasis was placed by the Lewis Group upon the estopping effect of the Florida judgment. In deciding this appeal, however, we think a more logical approach to what has now become a headlong jurisdictional collision between states is to consider first the question of what law governs the basic validity of the trust agreement and the exercise of the power of appointment, and whether or not under the applicable law the instruments are legally effective as such. We therefore take up first the question of essential validity of the trust and the exercise of the power of appointment.

There is no dispute concerning the pertinent facts. Wilmington Trust Company at all times has done business in Delaware. The trust agreement was executed in Delaware. The assets comprising the trust corpus were delivered to Wilmington Trust Company and retained by it in Delaware. The trust was administered wholly within Delaware. At the time the agreement was executed, Mrs. Donner was a resident of Pennsylvania.

In determining the situs of a trust for the purpose of deciding what law is applicable to determine its validity, the most important facts to be considered are the intention of the creator of the trust, the domicile of the trustee, and the place in which the trust is administered. *Wilmington Trust Co. v. Wilmington Trust Co.*, 26 Del. Ch. 396, 24 A. 2d 309; *Wilmington Trust Co. v. Sloane*, 30 Del. Ch. 103, 54 A. 2d 544; *Annotation 89 A. L. R.* 1033.

Generally speaking, a creator of an *inter vivos* trust has some right of choice in the selection of the jurisdiction, the law of which will govern the administration of the trust. *Wilmington Trust Co. v. Wilmington Trust Co.*, supra. This trust agreement was signed and the securities delivered to a trustee doing business in Delaware. We think that this circumstance clearly indicates the intent of Mrs. Donner to have the trust administered and governed according to the law of Delaware. 1 *Beale, The Conflict of Laws*, 599.

Formerly, some courts emphasized the domicile of the settlor in deciding what law governed, but the more recent trend of decisions has placed considerably more emphasis on the location of the trust property and its place of administration. *Land, Trust in the Conflict of Laws*, § 23; 1A *Bogert, Trusts and Trustees*, § 211, p. 327; *Restatement, Conflict of Laws*, § 294(2). The manifest intention of Mrs. Donner to create a Delaware trust with a Delaware trustee, the deposit of the trust assets in Delaware, and the administration of the trust in Delaware, make it clear that the

situs of the trust created by the agreement of 1935 is Delaware, and that, therefore, its law determines its validity.

Not only is it the rule that the essential validity of an inter vivos trust having its situs in Delaware is governed by its law, but it is equally the rule that the validity of the exercise of a power of appointment reserved in such a trust agreement is to be determined in accordance with Delaware law. *Wilmington Trust Co. v. Wilmington Trust Co.*, supra; *Equitable Trust Co. v. Snader*, 17 Del. Ch. 203, 151 A. 712; *Land, Trusts in the Conflict of Laws*, § 24. This is so because the appointments made by the exercise of the power are regarded in law as though they had been embodied in the original trust instrument, and as such as having been created by it. *Wilmington Trust Co. v. Wilmington Trust Co.*, supra.

We, therefore, hold that the law of Delaware determines the essential validity of this trust agreement and of the exercise of the power of appointment.

We now reach the question of whether or not this particular trust instrument and the exercise of the power reserved in it are valid under Delaware law.

The Lewis Group first argues that the agreement of 1935 created no present interest in remainder, either vested or contingent, in anyone prior to the death of Mrs. Donner, and that, therefore, it was a testamentary disposition and, as such, invalid for failure to comply with the Florida statutes concerning wills. In support of the argument are cited 3 *Scott on Trusts*, § 330.4; 1 *Bogert on Trusts and Trustees*, § 103; and *Restatement, Trusts*, § 56. We recognize the rule but we think that it does not apply to the trust created by Mrs. Donner in 1935.

By that agreement Mrs. Donner reserved a life interest to herself, and directed that upon her death the corpus should be distributed as directed by the exercise of a reserved power of appointment. In the event she should die without having exercised the power it was directed that the

corpus should be distributed to her then living issue, *per stirpes*, and in default of living issue, to her next of kin.

We think that a present interest in remainder came into existence with the creation of the trust in 1935. That remainder interest was lodged in Mrs. Donner's issue upon condition they survived her. By the same token, Mrs. Donner's next of kin had an interest in remainder conditioned upon Mrs. Donner dying without leaving surviving issue. It is true that both of these remainder interests—whether vested or contingent makes no difference—were subject to defeasance by the exercise of the reserved power of appointment. That, however, does not mean that they were not present interests created in 1935. *Gray, The Rule Against Perpetuities*, (4th Ed.) § 112(3); *Restatement, Property, Future Interests*, § 157, comment R. Furthermore, the exercise of the power of appointment by Mrs. Donner by instrument in her lifetime created present interests in the beneficiaries of the appointment, and under the rule of *Wilmington Trust Co. v. Wilmington Trust Co.*, supra, these interests are regarded in law as having been embodied in the agreement of 1935. Accordingly, we are of the opinion that the trust is not testamentary in character for failure to create present interests in persons other than the settlor at the time it was created.

The Lewis Group next points to certain provisions of the trust agreement and contends that the effect of them is to destroy it as an effective *inter vivos* deed of trust. These provisions are: (1) The reservation by Mrs. Donner of all of the net income from the trust for her life; (2) The reservation by Mrs. Donner of the right to amend or revoke the trust agreement in whole or in part; (3) The reservation by Mrs. Donner of the right to change the trustee under the trust; (4) The reservation by Mrs. Donner of the right to designate and to change an investment advisor to the trustee; (5) The limitation placed upon the trustee to the effect that certain powers could be exercised only with the consent

of or at the direction of the trust advisor, and (6) The reservation by Mrs. Donner of the power to appoint the trust corpus either by *inter vivos* instrument in writing, or by last will and testament.

The Lewis Group contends that cumulatively the above recited provisions have the legal effect of creating an agency relationship between Mrs. Donner and Wilmington Trust Company. It is, therefore, argued that since the relationship was one of agency, the disposition of the trust corpus by Mrs. Donner through the purported exercise of her reserved power of appointment was testamentary in character, and, as such, invalid under the law of Florida in which state she had died domiciled.

The Lewis Group cites authorities to the effect that if a settlor retains large powers of control over trust property and a power to change the ultimate beneficiaries of the trust to such an extent that the trust is made as ambulatory as a will, under some circumstances it will not be sustained as a trust, upon the theory that it is a disguised attempt by the settlor to make a revokable disposition of property to take effect after death. The question comes down to whether or not the combined effect of the reserved powers is such as to leave the settlor virtually the owner of the property and the trustee a mere agent. See *Annotation* 32 ALR(2) 1270.

In Delaware it has long been the law that the reservation of a life interest in trust income coupled with a power to revoke the trust and to dispose of the trust corpus by testamentary appointment will not make the trust testamentary in character. *Equitable Trust v. Paschall*, 13 Del. Ch. 87, 115 A. 356. Nor will the reservation of a power to change the trustee at the option of the settlor make it testamentary. *Wilmington Trust Co. v. Wilmington Trust Co., supra.*[6]

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6. This also seems to be the law in most jurisdictions. *United Bldg. & Loan Assn. v. Garrett*, (1946, D. C. Ark.) 64 F. Supp. 460; *Rose v. Rose*, 300 Mich. 73, 1 N. W. 2d 458; *Cleveland Tr. Co. v.*

However, the main thrust of the argument of the Lewis Group is directed to the provisions of the agreement providing for the designation of a trust advisor and the limitations on the power of the trustee to act only with the consent of or at the direction of the advisor.

By agreement, Mrs. Donner reserved the right to change the original advisor named and, in fact, she did so on two separate occasions. The agreement, however, specifically confines the powers of the trust advisor as limitations on the exercise of the trustee's powers to (1) the power to sell trust property; (2) the power to invest the proceeds of any sale of trust property, and (3) the power to participate in any plan of merger or reorganization of any company in which trust proceeds have been invested. With respect to the exercise of all of the other specific powers granted to the trustee the consent of the trust advisor is not required.

If it be assumed that the exercise by the trustee of the above enumerated powers had been conditioned solely upon the consent of Mrs. Donner herself, it is clear that that limitation would not have made the trust testamentary in character. *Restatement of Trusts*, § 57, Comment g; 1 *Scott on Trusts*, § 57.2; 1 *Bogert on Trusts and Trustees*, § 104; *National Shawmut Bank of Boston v. Joy*, 315 Mass. 457, 53 N. E. 2d 113. It follows logically, therefore, that if Mrs. Donner could have limited the power of the trustee to act only with her consent without making the trust testamentary, the same limitation could have been imposed by requiring the consent of a third party. In point of fact, the *National Shawmut Bank* case was precisely that situation, the power to control the investing of the trust funds

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White, 134 Ohio State 1, 15 N. E. 2d 627, 118 ALR 475; *Pickney v. City Bank Farmers Trust Co.*, 292 N. Y. S. 835; *Strause v. First Nat'l Bank of Ky.*, (Ky.) 245 S. W. 2d 914, 32 ALR 2d 126; *Leahy v. Old Colony Tr. Co.*, 326 Mass. 49, 93 N. E. 2d 238, 18 ALR 2d 1006; *City Bank Farmers Tr. Co. v. Charity Organization Society*, 265 N. Y. S. 267; *Farkas v. Williams*, 5 Ill. 2d 417, 125 N. E. 2d 600; See 1 *Scott on Trusts*, § 57.1.

having been conferred upon a third person. Furthermore, a trust advisor is a fiduciary, somewhat in the nature of a co-trustee, and is sometimes described as a quasi-trustee. *Gathright v. Gaut*, 276 Ky. 562, 124 S. W. 2d 782; *Restatement of Trusts*, § 185, Comment c; 2 *Scott on Trusts*, § 185. The resulting situation fundamentally is not unlike the appointment of co-trustees whose joint action is required in trust matters.

The agreement of 1935 by its terms reserves no power to Mrs. Donner herself over the control or management of the trust property, except such power as may come from her right to revoke the trust, change the trustee and change the advisor to the trustee. As far as the terms of the agreement itself are concerned, the trustee and the advisor were required to use their independent judgment in reaching decisions relating to the administration of the trust.

The terms of the agreement, therefore, do not compel the conclusion that Mrs. Donner retained such a measure of control over the management of the trust property that, as a matter of law, the Wilmington Trust Company and the trust advisor named were actually her agents. The entire management of the trust is vested by the terms of the instrument in the trustee and the advisor. We think, therefore, that under the law of Delaware the agreement of 1935 created a valid *inter vivos* trust and not an agency relationship as the Lewis Group contends.

The Lewis Group, however, urges that the history of operation of the trust by Wilmington Trust Company indicates clearly that Wilmington Trust Company was in fact a mere agent. To support this contention, affidavits and depositions were filed upon the theory that the agreement, itself, was ambiguous, and that the history of operation of the trust would be of assistance in resolving the ambiguity.

Such extrinsic evidence is material only in the event of ambiguity in the trust instrument itself. *Restatement of Trusts*, § 38. In our opinion, there is no ambiguity in this agreement. On the contrary, we think its provisions

are clear with respect to the acts of Wilmington Trust Company which required the consent of the trust advisor. The scheme used in drafting the agreement was to enumerate specific powers granted to Wilmington Trust Company, as trustee. It was then specifically directed that certain, but not all, of those powers should be exercised by Wilmington Trust Company only with the consent of or at the direction of the advisor of the trust. We think there is nothing ambiguous in this provision and that the requirement of consent of the trust advisor is confined to those specific powers. Consequently, we agree with the Acting Vice Chancellor that the evidence of the history of the trust administration is irrelevant.

In view, however, of the insistence of counsel upon the point, we will consider it, but we point out that in our opinion such consideration is unnecessary, and probably improper in the absence of an ambiguity in the instrument.

Generally speaking, the evidence discloses that Mrs. Donner named successively three different trust advisors, and that in administering the trust Wilmington Trust Company acted almost entirely in accordance with the directions of the trust advisor. We will assume, as they appear to do, that the affidavits support the contention of the Lewis Group that Wilmington Trust Company in all details of trust administration accepted unhesitatingly the directions of the advisor, and in fact exercised no independent judgment.

We have no doubt, however, that the voluntary giving up by a trustee of its independent functions as trustee to an advisor named in the trust instrument cannot operate to change the fundamental nature of the relationship created by the agreement. Such a voluntary failure to act as an independent trustee in those fields in which the agreement contemplated such action may be ground at the insistence of a beneficiary to remove the trustee but, certainly, it cannot change the relationship intended to be created by the trustor.

We note, also, that none of the facts supports at all the contention that Mrs. Donner, herself, had a hand in the management of the trust or made any of the decisions with respect to the internal management of the trust. Indeed, as far as the facts indicate, she knew nothing of the manner in which Wilmington Trust Company and the trust advisor were managing the affairs of the trust.

Assuming, therefore, that the evidence was material, a conclusion we expressly disclaim, nevertheless, there is no showing that Mrs. Donner retained any practical control of the management of the trust estate to the extent that the trustee and the trust advisor were thereby created her agents, with the consequence that, in law, the agreement of 1935 and the exercise of the power of appointment created by it were testamentary in character.

Our conclusion, therefore, is that the agreement of 1935 under the law of Delaware created a valid *inter vivos* trust. Under the law of Delaware, also, we think Wilmington Trust Company was required to transfer the trust assets pursuant to the directions contained in Mrs. Donner's exercise of the power of appointment delivered to it prior to her death.

The Lewis Group cites principally in support of its argument in this respect *In re Pengelly's Estate*, 374 Pa. 358, 97 A. 2d 844. The case, however, is of little aid to them. It was a suit brought by a widow, estranged from her husband for over forty years, to set aside a purported *inter vivos* trust which excluded her from any share in the husband's assets. The purported trust agreement transferred certain securities in trust and granted the trustee the right to invest trust assets "with the approval of the settlor during his lifetime." By the agreement the settlor reserved the income for life, and disposed of the corpus after his death in a manner to exclude his widow.

The court, in its opinion, states the fact to be that the trust agreement was in effect nothing more than the continu-

ance of an arrangement for the management of the settlor's affairs existing between the trustee and the settlor for a period of seven years prior to the execution of the agreement, and that that arrangement was one of principal and agent. Thus, *Pengelly's Estate* dealt with a purported trust which in reality perpetuated a previously existing principal and agent relationship. This relationship was unchanged and continued to be completely subjected to the actual directions of the settlor in its administration. As we have pointed out, in the case before us, however, Mrs. Donner exercised no actual control whatsoever. The two cases are clearly different.

We have been furnished a certified copy of the opinion of the Supreme Court of Florida in the litigation between some of the parties to this appeal. Later, we will have occasion to refer to this opinion under the point of collateral estoppel, but in connection with the question now under discussion we regard it merely as an additional authority cited by the Lewis Group.

The Florida Supreme Court held that the law of Florida governed the question of validity of the exercise of the power of appointment, because Mrs. Donner was domiciled in Florida at the time of her death. As we have pointed out, however, the domicile of a settlor is at most a minor factor to be considered in determining the situs of an *inter vivos* trust. As we read the opinion it appears to be the theory of the Florida Court that each exercise of the power of appointment was an amendment and republication of the agreement of 1935, and since no present remainder interest was created either by the agreement, or the exercise of the power, until the death of Mrs. Donner domiciled in Florida, the validity of those remainder interests was to be tested by Florida law.

With all deference to the highest tribunal of a sister state, we disagree. Such may be the law of Florida but it is certainly not the law of Delaware. As we have pointed

out, the exercise of a power of appointment creates immediate interests which in law are as though they had been written into the original instrument. The right to revoke or change the appointment has merely the effect of making the interests thereby created subject to possible defeasance. Furthermore, we think the Florida Supreme Court, in concluding that no present interests in remainder were created by the agreement of 1935, has overlooked, presumably inadvertently, the gift in remainder to Mrs. Donner's living issue, or next of kin, in default of exercise of the power.

We are also constrained to disagree with the conclusion of the Florida Supreme Court that the agreement of 1935 created an agency relationship. The decision in this respect is based, apparently, solely upon the provisions of the agreement, itself, reserving certain powers to Mrs. Donner and requiring in some instances joint action by the trustee and the advisor. As we have pointed out, the reservation of a power to revoke or appoint the corpus of an *inter vivos* trust does not transform the relationship into one of agency. Nor is there anything in the provisions relating to the trust advisor which suggests that the advisor was subject to the dictates of Mrs. Donner. Even the facts concerning the operation of the trust, which we suspect were not before the Florida court, rebut the violent presumption necessary to be made to support the conclusion reached. The opinion of the Florida Supreme Court is not persuasive as an authority.

We think our discussion of the validity of the agreement as an *inter-vivos* trust is sufficient answer to other authorities relied upon by the Lewis Group in support of its contentions under this point.

The second fundamental question is what effect, if any, does the adverse judgment entered in the Florida litigation have upon the right of the Hanson Group to litigate the question of essential validity of the trust of 1935 in Delaware.

The Florida judgment[7] is an adjudication that by reason of the probate of Mrs. Donner's will, Florida, as the state of domiciliary administration, has substantive jurisdiction to inquire into the validity of the 1935 trust and the exercise of the powers of appointment, references to which were made in the will, and to hold them invalid under Florida law. Upon this point, the Supreme Court of Florida affirmed the trial court's ruling of invalidity. In the cross appeal, which sought a review of the trial court's holding that Florida lacked jurisdiction over the non-appearing defendants (among which were Wilmington Trust Company, Delaware Trust Company),[8] the Florida Supreme Court reversed the trial court and held that jurisdiction over the trustee under the trust and the beneficiaries of the exercise of the power of appointment could be obtained by constructive service.

In their answer the Lewis Group pleads the Florida judgment and upon the basis of it asks for certain relief. The first prayer for relief is that Delaware Trust Company be ordered to account for the $400,000 received by it from the trustee and be directed to transfer it to the executrix of Mrs. Donner's will. The second prayer for relief is, in the event Delaware Trust Company not be ordered to account, that a money judgment be entered against Wilmington Trust Company in the amount of $417,000 with interest.

With respect to the second prayer for relief, it is obvious that, irrespective of the demand that Delaware Trust Company be ordered to account, the Lewis Group seeks a personal judgment against Wilmington Trust Company from the inclusion in the prayer for a judgment of $17,000, since Delaware Trust Company has never received this sum.

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7. By stipulation of the parties the record has been augmented to include the Florida judgment as finally framed by the Supreme Court of Florida, to all intents and purposes as though it had been pleaded and proven in the court below.

8. The recipients of $3,000 of the $17,000 appointment were not even named as parties *pro forma* in the Florida action.

The Lewis Group, therefore, seeks to use the Florida judgment as the basis for an assertion of personal liability against Wilmington Trust Company, and as a judgment *in rem* dispositive of the entire trust corpus. The full faith and credit clause of Article IV of the Federal Constitution is invoked.

The demand of full faith and credit for the Florida judgment as the prop for the assertion of personal liability against Wilmington Trust Company is defeated by the fact that Wilmington Trust Company has never been served personally with Florida process, nor has it appeared in any form in the Florida litigation. The recital of these facts is sufficient to require the denial of full faith and credit to the Florida judgment when it is sought to be made the basis for the assertion of personal liability. *Iowa-Wisconsin Bridge Co. v. Phoenix Corp.*, 2 Terry 527, 25 A. 2d 383, cert. den. 317 U. S. 671. It follows, therefore, that the prayer of the Lewis Group for a money judgment against Wilmington Trust Company was properly denied.

Next, the Lewis Group argues that the Florida judgment is entitled to full faith and credit as a judgment *in rem*. It is, of course, true that the courts of Florida may adjudicate with respect to a *res* within its boundaries and subject to its control, and full faith and credit may be successfully claimed for such a judgment in the courts of other states. *Restatement, Conflict of Laws*, § 429. But a judgment which has the force of a judgment *in rem* with respect to assets located in Florida does not acquire by reason of the full faith and credit clause any extra-territorial effect upon assets located outside of the State of Florida in the absence of seizure by the Florida courts. *Riley v. New York Trust Co.*, 315 U. S. 343, 62 S. Ct. 609. To have any extra-territorial effect such a judgment must have been rendered after the acquisition of personal jurisdiction over the party claiming the non-Florida assets. *Baker v. Baker, Eccles & Co.*, 242 U. S. 394, 37 S. Ct. 152.

The *res*, over which these parties are contending, consists entirely of corporate securities which at all times since 1935 have been located in Delaware. There has been no seizure of them by any judicial process in Florida, nor has any person or corporation holding the assets voluntarily by appearance brought them before the Florida courts.

The Supreme Court of Florida purports to find jurisdiction over this trust *res* by reason of the Florida domicile of Mrs. Donner and the probate there of her will. In an action brought to construe that will it rendered a decision "as to whether or not the instruments which created their [remainder] interests were effective to shift the trust property out of the estate of the testatrix." This was done on the theory that the last effective act of Mrs. Donner to establish remainder interests in the trust corpus, i.e., the execution of the power of appointment of 1949, was performed by her while a resident of Florida and amounted to a republication of the trust of 1935; it was held that it was as if the original instrument had been executed while she was domiciled in Florida. As we have pointed out, this result is contrary to the law of Delaware, and also the recent trend of well considered decisions in other states.

The Florida court relies upon *Henderson v. Usher*, 118 Fla. 688, 160 S. 9, but as we read that case it does not support their holding. In the *Henderson* case an action was filed for the construction of the will of a Florida decedent which purported to exercise a power of appointment over the corpus of an *inter vivos* trust created by a Florida resident in New York with a New York trustee. The donor deposited the securities comprising the trust corpus in New York, and in the instrument gave a power of appointment by will to the life beneficiary, a Florida resident. The will of the Florida donee of the power created an admittedly testamentary trust by the exercise of his power of appointment over the *inter vivos* trust corpus. Thereafter, the trustees of the testamentary trust, non-residents of Florida, instituted suit for the construction of the Florida will so

that they might be instructed as to their duties under the will and the testamentary trust.

The precise question in the *Henderson* case was the validity of constructive service upon the widow of the testator, who had remarried and was a resident of New York. Constructive service upon her was upheld upon the ground that the *res* before the court was the Florida will, and the trust established by it, and since the trustees under the will had voluntarily submitted it to the courts of Florida for adjudication, jurisdiction had thereby been conferred over the testamentary trust. Furthermore, there was no question but that the Florida will had by the exercise of the power created a Florida testamentary trust. In issue was the right of the widow to receive income from the testamentary trust. There was no issue concerning the rights of anyone arising out of the New York *inter vivos* trust.

The *Henderson* case, therefore, is not authority for the assertion of jurisdiction by Florida over an *inter vivos* trust created and administered in Delaware. The will of Mrs. Donner, contrary to the apparent view of the Florida Supreme Court, did not exercise the reserved power of appointment. That power was exercised in 1949 and a part of the Delaware trust corpus was appointed to her Florida executrix and disposed of by the residuary clause of her will. With respect to this portion of the *inter vivos* trust corpus, it is clear that Florida has jurisdiction since it passes as part of Mrs. Donner's estate; but with respect to the $417,000 appointed to non-Floridians it is equally clear, not only that Mrs. Donner did not intend it to pass as part of her estate, but that Florida has never had the remotest connection with or power over it.

The Florida Supreme Court cites as further authority for its assumption of jurisdiction over the 1935 trust the case of *Swetland v. Swetland*, 105 N. J. Eq. 608; 149 A. 50; aff. 107 N. J. Eq. 504, 153 A. 907. This case, however, is not authority for the assumption of jurisdiction under these circumstances. The *Swetland* case was a bill for accounting

against a non-resident trustee based on the dissipation and misappropriation of the corpus of an *inter vivos* trust created and administered in New York. The complainants sought an injunction against the New Jersey executors of the creator's New Jersey will, which added a large amount to the original *inter vivos* trust corpus, from paying it over to the trustee, and sequestered the non-resident trustee's interest in the creator's New Jersey estate. Since the assets themselves were in the hands of New Jersey executors and had by sequestration been subjected to the power of the court, it was held that irrespective of the situs of the trust the court could enforce its decree to the extent of the property sequestered. It is plain that the *Swetland* case is distinguishable.

It follows, therefore, that the Florida judgment is not entitled to full faith and credit as a judgment *in rem* as to the $417,000 which has never been subjected to the control of the Florida court and, as such, a bar to the action before us.

The Lewis Group next argues that irrespective of full faith and credit, the Florida judgment precludes the litigation of the question of essential validity of the 1935 trust as a matter of *res adjudicata* or, in the alternative, as a matter of collateral estoppel.

The doctrine of *res adjudicata* has no application in the pending action because the essence of the doctrine is that the prior judgment raised as a bar must have been rendered in a prior action between the same parties involving the same cause of action asserted in the second action. *Restatement, Judgments,* § 48; *Collateral Estoppel by Judgment,* 56 Harv. L. R. 1. It is obvious that we are dealing here with an entirely different cause of action from that tried in Florida. In Florida the issue was, what assets passed under the will of Mrs. Donner? The Florida ruling, that the exercise of the power of appointment was

testamentary, was an implicit ruling of invalidity of the 1935 agreement as an *inter vivos* trust, but it was only incidental to the main issue raised in the Florida proceeding.

This fact is sufficient answer to the assertion of the defense of *res adjudicata*, but it would seem to be clear that it could not be availed of in any event because of the inherent lack of jurisdiction of the Florida courts over some of the parties to this cause and over the subject matter of this suit.

The Lewis Group argues, in the alternative, that the Hanson Group, however, are collaterally estopped by the Florida judgment from relitigating the question of essential validity of the 1935 agreement as an *inter vivos* trust. The doctrine of collateral estoppel is recognized and applied in proper cases by Delaware courts. *Petrucci v. Landon*, 9 Terry 491, 107 A. 2d 236; *Niles v. Niles* (Del. Ch.), 111 A. 2d 697.

Florida in a direct proceeding would have had no jurisdiction to determine the validity of an *inter vivos* trust whose situs was in Delaware and whose trustee was not subject to Florida process. 54 *Am. Jur., Trusts*, § 564, § 584; *Lines v. Lines*, 142 Pa. 149, 21 A. 809. It may, however, occur that in an action in Florida over which Florida admittedly has jurisdiction it might become necessary for the Florida court to decide a question which it would have had no jurisdiction over in a direct proceeding brought for that purpose. In such event, when such question has actually been litigated and fought out by the same parties in the prior action, a collateral estoppel may sometimes be raised against such parties in a second action in which the same issue is raised. We are of the opinion, however, that no collateral estoppel arises in the pending case.

In the first place, a recognized exception to the doctrine exists when the second action is brought in a court having jurisdiction of the subject matter and parties to determine directly the issue decided only incidentally in the first

action. *Restatement, Judgments*, § 71; *Collateral Estoppel by Judgment*, 56 Harv. L. R. 1, 22; *Annotation*, 147 A. L. R. 225. The action before us was brought in the Court of Chancery to determine directly the validity of the 1935 agreement as an *inter vivos* trust and that court has jurisdiction of the subject matter and the necessary parties. Since the holding of invalidity by the Florida courts was only incidental to the main issue presented to it, the case falls directly within the exception to the doctrine.

In the second place, the doctrine of collateral estoppel is applied only when the same parties in the second action have had their day in court in the first action on the issue in question. This rule is based on the consideration that the proper administration of justice will be served best by limiting parties to one trial of one issue. See *Niles v. Niles*, supra.

The Florida judgment does not meet this condition, for the Delaware trustee and the beneficiaries of the exercise of the power have never had their day in court on this issue.

It does not answer this objection to argue, as the Lewis Group does, that these parties received notice of the pendency of the Florida action and could have appeared in that forum and defended the action. To be sure, they could have done so, but they elected not to, for there was no *res* before the Florida court the seizure of which would have furnished a compulsive force for their appearance. To hold that in the absence of jurisdiction over the *res* in controversy Florida can compel appearance through substituted service would be a violation of the due process clause of the 14th Amendment. *Pennoyer v. Neff*, 95 U. S. 714, 24 S. Ct. 565.

The Lewis Group argues, however, that Wilmington Trust Company and Delaware Trust Company are bound by the Florida judgment to all intents and purposes as though they had appeared in the cause because the various beneficiaries of the trusts were subject to the jurisdiction of the

Florida court.[9] The argument is that when a *cestui que trust* is bound by the judgment of a court, the trustee is likewise bound because he is in privity with the *cestui*. It is argued that these particular trustees were mere stakeholders and, as such, were unnecessary parties to the Florida action. *Thompson v. Hammond*, (N. Y.) 1 Edw. Ch. 497, and *First National Bank v. Ickes*, 60 F. Supp. 366, are cited in support of the argument. We have read these cases and are of the opinion that they do not remotely support the contention.

Furthermore, we think it the law that while a *cestui que trust* is bound in most circumstances by an adjudication against his trustee, *Iowa-Wisconsin Bridge v. Phoenix Corp.*, supra, the converse of that proposition is not the law, particularly when the adjudication affects the existence of the trust itself. It is the duty of a trustee to defend the existence of his trust, 2 *Scott on Trusts*, § 178, even against an attempt by the settlor and sole beneficiary to overthrow it. Cf. *Weymouth v. Delaware Trust Co.*, 29 Del. Ch. 1, 45 A. 2d 427. A trustee is also an indispensable party to a suit involving the trust property, and in defense of title to the trust property. 54 *Am. Jur., Trusts*, § 584.

In view of this, it is impossible to accept on principle the argument that a judgment against a *cestui que trust* binds the non-appearing trustee. At the argument, counsel for both groups stated that they had found no authority so holding, nor have our own researches disclosed any. Upon reflection, we are not surprised that there is none, for any such rule might permit a beneficiary by shopping around among jurisdictions to defeat the trust against the manifest intent of the trustor. We, therefore, are of the opinion that the non-appearing defendants in Florida are not estopped by the judgment on the ground of privity with appearing defendants.

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9. No similar argument is made with respect to the recipients of the $17,000 appointment.

Finally, we think the public policy of Delaware precludes its courts from giving any effect at all to the Florida judgment of invalidity of the 1935 trust. We are dealing with a Delaware trust. The trust *res* and trustee are located in Delaware. The entire administration of the trust has been in Delaware. The attack on the validity of this trust raises a question of first impression in Delaware and one of great importance in our law of trusts. To give effect to the Florida judgment would be to permit a sister state to subject a Delaware trust and a Delaware trustee to a rule of law diametrically opposed to the Delaware law. It is our duty to apply Delaware law to controversies involving property located in Delaware, and not to relinquish that duty to the courts of a state having at best only a shadowy pretense of jurisdiction. Cf. *Taylor v. Crosson*, 11 Del. Ch. 145, 98 A. 375.

We conclude, therefore, that the agreement of 1935 between Mrs. Donner and Wilmington Trust Company created a valid *inter vivos* trust, that the exercise by Mrs. Donner of the power of appointment reserved in that agreement was effective to dispose of the trust corpus, and that the parties to this cause are not estopped by the Florida judgment from having those questions adjudicated by the Delaware Court of Chancery.

The judgment of the Court of Chancery will be affirmed.

IN THE
SUPREME COURT OF THE STATE OF DELAWARE.

DORA STEWART LEWIS, MARY WASHINGTON STEWART BORIE and PAULA BROWNING DENCKLA,
Defendants Below, Appellants,

v.

ELIZABETH DONNER HANSON, as Executrix and Trustee under the Last Will of Dora Browning Donner, deceased,
Plaintiff Below, Appellee,

WILMINGTON TRUST COMPANY, a Delaware corporation, as Trustee under three separate Agreements, (1) and (2) with William H. Donner dated March 18, 1932 and March 19, 1932, and (3) with Dora Browning Donner, dated March 25, 1935, et al.,
Defendants Below, Appellees.

No. 8, 1956.

Appeal from the Court of Chancery of the State of Delaware in and for New Castle County, Civil Action No. 531.

ORDER.

AND NOW, TO WIT: this 7th day of February, A. D. 1957, the petition of Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla for re-argument having come on to be heard, and the same having been duly considered, it is

ORDERED, ADJUDGED and DECREED:

That the same be and hereby is denied, and it is

FURTHER ORDERED, ADJUDGED and DECREED:

That the mandate of this Court shall be stayed for a period of ninety (90) days from the date hereof to permit the said Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla to apply to the Supreme

Court of the United States for a writ of certiorari, and, if such application be made within said period, the mandate of this Court shall be stayed until the final order of the Supreme Court of the United States.

DANIEL F. WOLCOTT,
Justice.

HOWARD M. BRAMHALL,
Justice.

JAMES B. CAREY,
Judge.

APPROVED AS TO FORM:

EDWIN D. STEEL, JR.,
DuPont Building
Wilmington, Delaware
Guardian ad litem for Joseph Donner Winsor, Curtin Winsor, Jr., and Donner Hanson;

C. S. LAYTON,
DuPont Building
Wilmington, Delaware
Attorney for Wilmington Trust Co., Trustee;

R. B. WALLS, JR.
Industrial Trust Building
Wilmington, Delaware
Guardian ad litem for Dorothy B. R. Stewart, et al.;

DAVID F. ANDERSON
Delaware Trust Building
Wilmington, Delaware
Attorney for Delaware Trust Co., Trustee;

AUBREY B. LANK
Continental American Building
Wilmington, Delaware
Attorney for Dora Stewart Lewis, et al.